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Oct. 7, 1877

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 208.

DUNDASS T. PRATT, PLAINTIFF IN ERROR,

vs.

JOHN PRATT.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED OCTOBER 13, 1875.

SUPREME COURT OF THE UNITED STATES.

No. 208.

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United States circuit court, northern district of Illinois.

1 Pleas in the circuit court of the United States for the northern district of Illinois, held at the United States court-rooms in the city of Chicago, in the district aforesaid, before the Hon. Henry W. Blodgett, district judge, sitting pro tempore in the absence of the Hon. Thomas Drummond, circuit judge, on Tuesday, the twenty-eight day of April, in the adjourned March term of said court in the year of our Lord one thousand eight hundred and seventy-four, and of our Independence the ninety-seventh year.

WILLIAM H. BRADLEY, *Clerk.*

DUNDASS T. PRATT
v.
JOHN PRATT. } Ejectment.

Be it remembered that on the 27th day of March, A. D. 1873, in the adjourned March term of said court, in the record of the proceedings thereof in said entitled cause appears the following entry, to wit:

DUNDAS T. PRATT
v.
JOHN PRATT. } Ejectment.

2 On motion of the plaintiff by his attorney, notice having been given to the defendant's attorney, leave is given him to file (in place of the original declaration and plea heretofore filed herein and destroyed by fire on the ninth day of October, eighteen hundred and seventy-one) copies of the same, and it is ordered that said copies be substituted for and have the same effect as the original so destroyed.

And on the same day, to wit, the 27th day of March, A. D. 1873, said plaintiff, by his attorney, filed in said clerk's office his petition to restore record, with copies of the original bond for costs, declaration with affidavit attached, notice, and plea of the defendants in said entitled cause; which said petition, bond, declaration, notice, and plea are in the words and figures following, to wit:

Petition to restore record.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

In the circuit court of the United States in and for said district.

DUNDASS T. PRATT
vs.
JOHN PRATT.

The petition of Dundass T. Pratt, who is a citizen of the State of Pennsylvania, and resident at Philadelphia, in said State, shews unto this hon. court that your petitioner, on or about the 30th day of
3 April, A. D. 1869, filed in this hon. court a bond for costs in the words and figures following, to wit:

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

In the circuit court of the United States in and for said district, of the April term, A. D. 1869.

DUNDASS T. PRATT
vs.
JOHN PRATT.

I do hereby enter myself security for costs in this cause, and acknowledge myself bound to pay or cause to be paid all costs which may accrue in this action either to the opposite party or to any of the officers of this court in pursuance of the laws of tnis State.

Dated April 30, A. D. 1869.

(Signed) EDWARD J. HILL.

And also at the same time your petitioner filed in this hon. court a declaration, with affidavit and notice, in said entitled cause, which were in the words and figures as follows, respectively:

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

In the United States circuit court in and for said district, of the April term in the year of our Lord one thousand eight hundred and sixty-nine.

Dundass T. Pratt, who is a citizen of the State of Pennsylvania,
4 and in this action the plaintiff, by Hill & Dale, his attorneys, comes and complains of John Pratt, who is a citizen of the State of Illinois, and in this action the defendent, in a plea of ejectment.

For that whereas the said plaintiff, on the first day of January, in the year of our Lord one thousand eight hundred and sixty-five, was possessed of a certain piece or parcel of land, with the appurtenances, situate in the county of Mercer, in the State of Illinois, and known, designated, and described as follows, viz: The east half of the northeast quarter of section thirty-two, (32,) of township fourteen (14) north, of range two (2) west of the 4th principal meridian, of the value of twenty-five hundred dollars, ($2,500,) of which said premises the said plaintiff claims to be the owner in fee-simple absolute; and the said plaintiff being so possessed thereof, the said defendant afterward, to wit, on the first day of January, in the year of our Lord one thousand eight hundred and sixty-five, entered into the said premises and ejected the said plaintiffs therefrom, and unjustly withholds from the said plaintiff the possession thereof, to the damage of said plaintiff of twenty-five hundred dollars, and therefore he brings suit, etc.

HILL & DALE,
Attorneys for Plaintiff.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Edward J. Hill, being duly sworn, says that he is one of the
5 attorneys for Dundass T. Pratt, the plaintiff named in the within and foregoing declaration, and that such attorney has the written

request of the said plaintiff to commence this suit against the said defendant, in the possession of the affiant.

EDWARD J. HILL.

Subscribed and sworn to before me this 1st day of April, A. D. 1869.
(Signed) W'M H. BRADLEY,
Clerk.

To JOHN PRATT, defendant named in the within declaration:

Please take notice that the within declaration will be filed in the clerk's office of the circuit court of the United States for the northern district of Illinois, at the city of Chicago, on the first day of the next term of said court, and on the 1st day of May, A. D. 1869, and that upon filing the same a rule will be asked requiring you, the said defendant, to appear and plead to such declaration within twenty days after the entry of such rule, and that if you neglect so to appear and plead, a judgment by default will be entered against you and the plaintiff will recover possession of the premises.

HILL & DALE,
Plaintiff's Attorneys.

Dated Chicago, April 1, A. D. 1869.

STATE OF ILLINOIS,
Mercer County, ss:

6 John Smith, being duly sworn, says that he served the within and foregoing declaration, affidavit, and notice upon John Pratt, the defendant therein named, by leaving a copy of the same, with said notice, with, and reading the same to, said John Pratt, in the town of Aledo, in said county, on the 6th day of April, A. D. 1869.

JOHN SMITH.

Subscribed & sworn to before me this 6th day of , A. D. 1869.

[SEAL.] J. K. BASSET,
Notary Public.

That afterwards, and on or about the 15th day of May, A. D. 1869, the said defendant appeared, by Mess'rs Kirkpatrick, his attorneys, and filed his plea in said cause in words and figures as follows:

UNITED STATES OF AMERICA,
Northern District of Illinois:

In the circuit court of the United States in and for said district.

DUNDASS T. PRATT
v.
JOHN PRATT.

And now comes the said defendant, by Mess'rs Kirkpatrick, and defends the wrong and injury when, &c., and says that he is not guilty of withholding the possession of said premises in said declaration mentioned, as the plaintiff herein hath complained thereof against him, and of this the defendant puts himself upon the country.

7 JOHN PRATT,
Defendant,
By KIRKPATRICK,
His Attorneys.

And your petitioner thereupon joined issue upon said plea by adding the similiter according to the custom and practice of this hon. court, and that afterwards the Hon. Charles M. Harris was substituted as at-

torney for defendant in said cause. And that afterwards, while said cause was pending and at issue as aforesaid, and on the 9th day of October, A. D. 1871, the United States custom-house, containing the records, and files of this hon. court, was, together with such records and files, among which were the said records, papers, and files in this cause, totally destroyed by fire without the fault or neglect of your petitioner, so that certified copies thereof cannot be obtained, and that such loss or destruction, unless supplied, will result in damage to your petitioner.

Wherefore your petitioner prays that this petition, together with the copies of the papers and pleadings in this cause as therein set forth, may be entered of record in this cause pursuant to the statute in such case made and provided. And your petitioner will ever pray, &c.

DUNDAS T. PRATT,
By EDWARD J. HILL,
His Attorney.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

8 Edward J. Hill, being duly sworn, says that the above and foregoing petition by the said Dundass T. Pratt made, is true of affiant's own knowledge; that affiant was one of said petitioner's attorneys in this suit, & makes this affidavit for and on behalf of said plaintiff, because said plaintiff is not in the city of Philadelphia, and affiant is more conversant with the facts in said petition contained.

EDWARD J. HILL.

Subscribed and sworn to before me this 17th day of March, A. D. 1873.

E. A. DRUMMOND,
U. S. Com.

Hon. C. M. HARRIS,
Defendant's Attorney:

Please take notice that I shall apply to the court on Thursday, March 27, A. D. 1873, at the opening of the court on that day, for leave to file the above and foregoing petition for the granting of the prayer thereof.

EDWARD J. HILL.

MARCH 17, 1873.

Service of the within papers by copy admitted this 17th day of March, A. D. 1873.

C. M. HARRIS,
Defendant's Att'y.

(Endorsed:) Filed March 27, 1873. W'm H. Bradley, cl'k.

9 And on the same day, to wit, the 27th day of March, A. D. 1873, said plaintiff, by his attorney, filed in said clerk's office his bond for costs in said entitled cause, which said bond is in the words and figures following, to wit:

Bond for costs.

UNITED STATES OF AMERICA,
Northern district of Illinois, ss:

Circuit court, March term, A. D. 1873.

DUNDASS T. PRATT
vs.
JOHN PRATT. } In

I hereby enter myself security for costs in this cause, and promise to pay all costs which may accrue to the opposite party in this action or to

any of the officers of this court; and in default of payment by the plaintiff of any costs ordered or adjudged to be paid by him, I hereby agree and stipulate that execution may issue against my property for any costs taxed against him, said plaintiff.

Dated this 27th day of March, A. D. 1873.

EDWARD J. HILL.

(Endorsed:) Filed March 27th, A. D. 1873. W'm H. Bradley, clerk.

And afterwards, to wit, on the 28th day of April, A. D. 1874, in the adjourned March term of said court, in the record of the proceedings thereof in said entitled cause appears the following entry, to wit:

DUNDAS T. PRATT
vs. } Ejectment.
JOHN PRATT.

Now come the parties, by their attorneys, and, upon issue joined thereupon, come a jury of good and lawful men, to wit, W. S. Wood, A. H. Palmer, William Pool, A. E. Young, Jeffrey Wells, H. K. Johnson, R. D. Peeronett, James A. Stewart, Charles Miller, Daniel Rogers, U. N. McKinney, and T. D. Boardman, who were all duly elected, tried, and sworn well and truly to try said issue, and, after hearing the evidence and the arguments of counsel and receiving the instructions of the court, the jury returned the following verdict, to wit: "We, the jury, find the defendant not guilty;" and thereupon the plaintiff, by his attorney, moves the court for a new trial herein.

And afterwards, to wit, on the 29th day of June, A. D. 1874, in the adjourned May term of said court, in the record of the proceedings thereof in said entitled cause is the following entry, to wit:

DUNAS T. PRATT
vs. } Ejectment.
JON PRATT.

The motion of the plaintiff heretofore entered herein for a new trial of his cause having this day been called up for hearing, and the plaintiff and his attorneys failing to appear and support the same, said motion is overruled. It is thereupon considered and adjudged by the court that the defendant be discharged, and that he go hence without day, and that he have and recover of the plaintiff his costs about his defence in this behalf expended, amounting to the sum of thirty-eight dollars and seventy-five cents, and that he have execution therefor.

And on the same day, to wit, the 29th day of June, A. D. 1874, on the hearing of said cause, the following exceptions were taken and were allowed by the court and made of record in said cause, and are in the words and figures following, to wit:

Bill of exceptions.

In the circuit court of the United States for the northern district of Illinois.

DUNDASS T. PRATT
vs. } Bill of exceptions.
JOHN PRATT.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Be it remembered that at a regular term of the circuit court of the

United States of America in and for the northern district of Illinois, and on the 28th day of April, A. D. 1874, before the Hon. H. W.
12 Blodgett, judge of said district, presiding, came Dundass T. Pratt, the plaintiff, by Hill & Cowan, his attorneys, and also John Pratt, the defendant, by Charles M. Harris and James Bassett, his attorneys, to try the cause in ejectment therein pending and at issue between the parties aforesaid, and a jury of twelve good and lawful men of said district having been called, tried, and sworn to try said issues to sustain the same, the plaintiffs then and there produced—

First. A patent from the United States to Elias B. Stiles, dated October 2, 1854, conveying the northeast quarter of section 32, T. 14, range 2 west, situate in Mercer County in said district.

Second. A warranty deed dated October 30, 1856, from Elias B. Stiles and wife to John Dement, duly acknowledged and recorded in said county, conveying the said lands.

Third. A warranty deed dated December 22, 1856, from John Demett and wife to Isaac Speer, duly acknowledged and recorded in said county, conveying the said lands.

Fourth. A judgment of the United States circuit court for said district, rendered at the July term, A. D. 1857, in an action then depending therein, wherein said Isaac Speer was defendant and Dundass T. Pratt, (the plaintiff herein,) Benjamin B. Peath, and William G. Billin were plaintiffs, in the sum of two thousand eight hundred and four dollars and thirty cents ($2,804.30) damages and twenty-six dollars and seventy-seven cents ($26.77) costs.

13 And the plaintiff thereupon proved that the July term A.D. 1857 of said court was adjourned on the 4th day of August, A.D. 1857, and that upon said judgment an execution was issued out of and under the seal of said court on the 9th day of August, A. D. 157, which was afterwards duly returned into said court satisfied on in part; and that upon said judgment afterwards an alias execution was also issued out of and under the seal of said court, which was also returned unsatisfied; and that afterwards upon said judgment a pluries execution was also issued out of and under the seal of said court, which was also returned unsatisfied. And that afterwards a second pluries writ of execution or fieri facias upon said judgment issued out and under the seal of said court, bearing date the seventh day of March, 1863, directed to John R. Jones, then marshal for said district, who afterwards, under and by virtue of said writ, levied on said lands and other lands belonging to said Isaac Speer, and that said levy was made on the said lands, and that said marshal proceeded to and did sell on said levy and by virtue of said writ the said east half of the NE. of said sec 32, T. 14, R. 2 west, in Mercer County, at the north door of the court house in Chicago, in Cook County, Illinois, on the 8th day of July, A. D. 1863, at 10 o'clock a. m., to Dundass T. Pratt, (the plaintiff herein,) at public auction, at the sum of $120.00, he being the highest and best
bidder therefor at said sale.

14 And the plaintiff then read in evidence a copy of the certificate of purchase made by said marshal on said sale, dated July 8, 1863, and filed in the recorder's office July 31, 1863, in said Mercer County.

And the plaintiff then read in evidence the marshal's deed on said sale, dated February 24, 1865, signed by John R. Jones, United S. marshal, northern district of Illinois, and sealed with his seal, reciting said judgment, execution, levy, and sale as aforesaid, and conveying said lands, among other lands, to Dundass T. Pratt, the plaintiff herein,

which deed was acknowledged February 24, 1865, and was afterwards, on the 6th day of September, 1866, recorded in the recorder's office, in Mercer County, aforesaid.

And it was admitted by the parties that this suit was commenced by the service of the declaration, affidavit, and notice on the defendant on the 15th day of May, A. D. 1869, at which time the defendant was in possession of the lands described in said declaration.

And the plaintiff then rested.

And thereupon the defendant, to sustain said issue on his part, offered in evidence the patent and the conveyances relating to said land from the United States to Isaac Speer, which had been read in evidence by the plaintiff as aforesaid, together with the following conveyances, to wit:

First. A quit-claim deed from Isaac Speer & wife to Thomas
15 Speer, dated October 10, 1857, acknowledged October 15, 1857, and recorded in said Mercer County on the 24th day of October, 1857, conveying said lands.

Second. A quit-claim deed from Thomas Speer to Samuel Roberts, dated February 7, 1859, acknowledged February 7, 1859, and recorded in said county on the 19th day of February, 1859, conveying said lands.

Third. A quit-claim deed from Samuel Roberts and wife to Charles L. Roberts, dated March 30, 1863, acknowledged April 1, 1863, and recorded in said county April 24, 1863, conveying said lands.

Fourth. A warranty deed in consideration of the sum of $600 from Charles L. Roberts and wife to John Pratt, the defendant, dated May 5, 1865, acknowledged June 12, 1865, and recorded in said county July 7, 1865, conveying the E. ½ of S.E. ¼ of sec. 29, and E. ½ of N.E. ¼ of sec. 32, T. 14 N., R. 2 west.

And in connection with said patent and conveyances, the said defendant offered in evidence his own deposition, showing and stating as he therein says:

My name is John Pratt; age, 49; reside in Green Township, Mercer County, Illinois; am a farmer, and live on the E. ½ of the N.E. ¼ of sec. 32, T. 14 north, R. 2 west of the 4th P. M., the land in controversy in this suit. I have known this piece of land since the latter part of September, 1861, since which time I have occupied it as a purchaser. I purchased it in Sept., 1861, of Samuel & Charles L. Roberts by written contract. The written contract I delivered after this suit was commenced to Alexander G. Kirkpatrick. This contract was
for the sale of the E. ½ of S.E. ¼ of sec. 29, and the E. ½
16 of N. E. ¼ of sec. 32, in township 14 N., range 2 west, two 80-acre tracts to me. I was to improve land on the west for land on the east of the same quarter section. I was to improve in the whole 160 acres for every forty I improved for him. He was to deed a forty on the east part of said quarter to me. I occupied the land under this contract until May, 1862; after that under a verbal contract. I was to pay him four dollars per acre for 160 acres. He had received fifty dollars from me. I was to pay him one hundred dollars a year afterwards until the land was paid for, with ten per cent. interest, I paying taxes on all the land. I occupied the lands under the contract until Charles L. Roberts conveyed the same to me. I placed the first improvements thereon in October, 1861. In October, 1861, I improved only about 2½ acres by having it broke. In September, 1861, I built a house on the south part of the 80 acres on section 32, and moved into it with my family about the first day of October, 1861, and have continued to reside there ever since with my family. In the spring of 1862 I enclosed

twelve acres by fence, which included the 2½ acres broke in fall of 1861. I broke the balance during the summer. In 1863 I broke twenty acres more, all on the tract in sec. 32. I also enclosed the twenty acres with fence in 1863. In 1864 I broke and fenced twelve acres more in the same tract. In the spring of 1865 I set out an orchard, and in 1865 or 1866 I enclosed the balance of that tract and ten acres of the
17 other tract, making 90 acres in all improved. In 1863 I built a new house and also a barn on the tract in sec. 32.

And it was then admitted by the parties that on the E. ½ of the NE. ¼ of said sec. 32 the taxes for 1864, 1865, 1866, 1867, & 1868 were severally paid by the defendant, and that the receipts therefor were given and taken in his name.

Witness further says: I don't know who paid the taxes for 1861 due in 1862. I paid the taxes for 1862 in 1863 in the name of Charles L. Roberts. I paid them for myself under my contract, and delivered the receipts to Charles L. Roberts. I paid the taxes for 1862 early in the spring of 1863. I paid the taxes of 1863, due in 1864, in Charles L. Roberts' name for myself, under my contract. I paid them early in the spring of 1864, & delivered the receipt to Charles L. Roberts.

And in cross-examination witness further says:

Question. With whom was the original contract made in 1861 by you for the purchase of these lands? Was it with Samuel Roberts, the father of Charles L. Roberts the son?

Ans. The contract was made at the house of C. L. Roberts, in Oswego, Kendall County, Ill. The old gentleman claimed the land. I was at work at that time for C. L. Roberts, at Oswego. They induced me to come out here and on the lands, and take them and pay for them by improving other lands with them. The agreement made in writ-
18 ing was never carried out. It was on my part but not on the part of Samuel Roberts, and I therefore threw it up in the spring of 1862. We then made a new agreement by word of mouth.

Question. With whom was this agreement made, the father or the son?

Answer. With both. It was then understood that I was to pay four dollars per acre for the land and remain in possession and pay all taxes.

Question. Was this second agreement for the purchase made before or after you paid taxes on the land?

Answer. Before I paid taxes on either tract.

Question. Why did you send the receipts for the taxes which you paid for 1862 to Samuel Roberts?

Answer. Because I had not paid for the land. He said he ought to have the tax receipts, and I sent them to him.

And it was admitted between the parties to this suit that the tax-books on file in Mercer County show that the taxes on the east half of the NE. ¼ of sec. 32, T. 14, R. 2, were paid as follows:

For 1861 by Samuel Roberts, May 24, 1862.
For 1862 by Charles L. Roberts, April 24, 1863.
For 1863 by Charles L. Roberts, April 30, 1864.
For 1864 by John Pratt, April 10, 1865.
For 1865 by John Pratt, May 19, 1866.
For 1866 by John Pratt, April 4, 1867.
For 1867 by John Pratt, before February 15, 1868.
For 1868 by John Pratt, April 14, 1869.

And to the reading of said deeds, respectively, and the said dep-
19 osition in evidence the plaintiff's counsel objected, because said

deeds are immaterial and incompetent, and because said written contract between said Roberts & the defendant is the best evidence of its contents, and because the defendant in his deposition seeks to show a contract not in harmony with the deed of conveyance from Charles L. Roberts & wife to the defendant; which objections the court then and there overruled, and the plaintiff's counsel to said ruling then & there excepted, and the said patent and the said several deeds were then read in evidence; and the said defendant, by his counsel, called Charles M. Harris as a witness in his behalf; who, being duly sworn, testified that the written contract to which defendant in his deposition referred was destroyed in said Harris' office in the great fire at Chicago, in October, 1871, and the said deposition was then read in evidence.

And the foregoing was all the testimony adduced by the parties at the trial of said cause.

And the court thereupon charged and instructed the jury:

That, if they should find from the evidence that John Pratt, the defendant, began to reside on said lands, to wit, the east half of N. E. ¼ of sec. 22, T. 14, R. 2 west, in said Mercer County, and had continued to reside on said land for seven years prior to the commencement of this suit, claiming title under a contract with Samuel Roberts, who had a connected title in law or equity, deducible of record from the United
20 States; and that defendant subsequently acquired a title to said premises, under and in pursuance of said contract, then their verdict should be for the defendant, and in form "Not guilty."

To which instruction the plaintiff's counsel then & there excepted.

And the jury thereupon deliberated, and returned their verdict for the defendant, "Not guilty."

Whereupon the plaintiff's counsel entered a motion to set aside said verdict, and for a new trial on the merits in said cause, for the reason that said verdict is contrary to law and against evidence, and against evidence and contrary to law. And, after argument, the court overruled said motion; to which ruling and decision the plaintiff's counsel then & there excepted.

And because none of said exceptions appear of record in said cause, the plaintiff, by his counsel, asks that this his bill of exceptions be signed, sealed, enrolled, and made a part of the record in said cause.

And it was done this 29th day of June, A. D. 1874.

H. W. BLODGETT, *Judge.*

(Endorsed:) Filed June 29th, 1874. W'm H. Bradley, cl'k.

And afterwards, to wit, on the 19th day of April, A. D. 1875,
21 the following appeal-bond was filed in said clerk's office, which is in the words and figures following to wit:

Appeal-bond.

Know all men by these presents that we, Ben'n P. Reynolds and Edward J. Hill, are held and firmly bound unto John Pratt in the full and just sum of two hundred and fifty dollars, to be paid to the said John Pratt, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals, and dated this nineteenth day of April, in the year of our Lord one thousand eight hundred and seventy-five.

Whereas lately, at a regular term of the circuit court of the United

States for the northern district of Illinois, and on the 29th day of June, A. D. 1874, in a suit depending therein between Dundass T. Pratt and John Pratt, a judgment was rendered against the said Dundass T. Pratt and in favor of the said John Pratt, and the said Dundass T. Pratt having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said John Pratt citing and admonishing him to be and appear at a Supreme Court, to be holden at Washington the second Monday of October, A. D. 1875: Now the condition of the above obligation is such that if the said Dundass T. Pratt shall prosecute the
22 said writ of error to effect and answer all damages and costs if he shall fail to make his plea good, then the above obligation to be void else; to remain in full force and virtue.

B. P. REYNOLDS. [SEAL.]
EDWARD J. HILL. [SEAL.]

Signed, sealed, and delivered in presence of—
A. K. HALL.
W. H. WILES.

Approved.

H. W. BLODGETT, *Judge.*

(Endorsed:) Filed April 19th, 1875. W'm H. Bradley, clerk.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

23 I, William H. Bradley, clerk of the circuit court of the United States for said district, do hereby certify the above and foregoing to be a true, correct, and complete transcript of the record of all the proceedings had in the cause wherein Dundass T. Pratt is the plaintiff and John Pratt is the defendant, as the same appears from the files and records of said court now remaining in my custody and control.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at my office at Chicago, in said district, this 7th day of October, A. D. 1875, and of our Independence the 100th year.

[SEAL.] W'M H. BRADLEY, *Clerk.*

24 UNITED STATES OF AMERICA, *ss:*

The United States to the honorable the judges of the circuit court of the United States for the northern district of Illinois, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, between Dundass T. Pratt and John Pratt, a manifest error hath happened, to the great damage of the said Dundass T. Pratt, as by his complaint appears:

We, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and accord-

ing to the laws and customs of the United States should be done.
25 Witness the honorable Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, the 19th day of April, in the year of our Lord one thousand eight hundred and seventy-five.

[SEAL.] W'M H. BRADLEY,
Clerk of the Circuit Court of the United States for the Northern District of Illinois.

(Indorsed:) In error. Supreme Court of the United States. To the circuit court of the U. S. for the N. dist. of Illinois. Dundass T. Pratt, pl'ff in error, vs. John Pratt, def't in error. Writ of error. Edward J. Hill, att'y for pl'ff in error.

26 THE UNITED STATES OF AMERICA, *greeting:*

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October, A. D. 1875, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern district of Illinois wherein Dundass T. Pratt, of Philadelphia, in the State of Pennsylvania, and a citizen of said State, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Hon. Henry W. Blodgett, judge of the northern district of Illinois, at Chicago, this nineteenth day of April, A. D. 1875.

H. W. BLODGETT, *Judge.*

I hereby admit service of the within & above citation on me this 26th day of April, A. D. 1875, at Chicago, Cook County, Illinois.

C. M. HARRIS,
Att'y for Appellee.

(Indorsed:) In error. Supreme Court of the United States to the circuit c't of U. S. N. dist. of Ill. Dundass T. Pratt, plaintiff in error, vs. John Pratt, def't in error. Citation. Edward J. Hill, att'y for pl'ff in error. Charles M. Harris, att'y for def't in error.

27 Supreme Court of the United States.

DUNDASS T. PRATT
vs.
JOHN PRATT. } In error.

And afterward, to wit, on the second Monday of October, in the year of our Lord one thousand eight hundred and seventy-five, before the justice of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the said Dundass T. Pratt, by Edward J. Hill, his attorney, and says that in the record and proceedings aforesaid there is manifest error in this:

First. That the court below admitted the title-papers and other testimony on the part of the defendant, because the same were and are immaterial and incompetent.

Second. That the court instructed the jury: "That if they should find from the evidence that John Pratt, the defendant, began to reside on said lands, to wit, the east half of N. E. ¼ of sec. 32, T. 14, R. 2

west, in said Mercer County, and had continued to reside on said
28 land for seven years prior to the commencement of this suit, claiming title under a contract with Samuel Roberts, who had a connected title, in law or equity, deducible of record from the United States, and that defendant subsequently acquired a title to said premises under and in pursuance of said contract, then their verdict should be for the defendant," which instruction was wrong both in law and in fact.

Third. That the motion for a new trial was overruled.

Fourth. That the verdict was and is contrary to law and evidence and against evidence and law, and that the judgment aforesaid was given in favor of the said John Pratt, against the said Dundass T. Pratt, whereas, by law of the land, said judgment should have been given for the said Dundass T. Pratt and against the said John Pratt.

29 And the said Dundass T. Pratt prays that the said judgment may be reversed, annulled, and altogether held for nothing, and that he may be restored to all things which he hath lost by occasion of the said judgment, &c.

EDWARD J. HILL,
Attorney for Plaintiff in Error.

(Indorsed:) Supreme Court of U. S. In error. Dundass T. Pratt v. John Pratt. Assignment of errors & appearance for plaintiff in error. Edw'd J. Hill, for pl'ff in error.

(Indorsement on cover:) No. 208. Dundass T. Pratt, plaintiff in error, vs. John Pratt. N. Illnois C. C. U. S. Filed 13th October, 1875.

IN THE

SUPREME COURT

OF THE

UNITED STATES

OF THE

OCTOBER TERM, A. D. 1875.

DUNDASS T. PRATT,
Plaintiff in Error.
vs.
JOHN PRATT,
Defendant in Error.

Writ of Error to the Circuit Court of the United States for the Northern District of Illinois.

Brief and Points for Plaintiff in Error.

CHICAGO:
HAZLITT & REED, PRINTERS, 172 & 174 CLARK ST.
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vs.
JOHN PRATT,
Defendant in Error.

Writ of Error to the Circuit Court of the United States for the Northern District of Illinois.

BRIEF AND POINTS FOR THE PLAINTIFF IN ERROR

CASE.

This was an action of ejectment, brought May 15, 1869, by the plaintiff in error, to recover possession of the E. ½ of the N. E. ¼ of Sec. 32, T. 14, N. of Range 2, west of the third P. M., of the value of $2,500, situate in Mercer County, in the Northern District of Illinois. The declaration is in the usual form.

The general issue was pleaded and similiter added, according to the practice of the court below.

The cause was tried, April 28, 1874, before HON. H. W. BLODGET, the District Judge, and a jury.

PLAINTIFF'S CASE.

The plaintiff proved:

First. A patent from the United States to Elias B. Stiles, dated October 2, 1854, conveying the north-east quarter of said section 32.

Second. A warranty deed, dated October 30, 1856, from Elias B. Stiles to John Dement, duly acknowledged and recorded, conveying the said lands.

Third. A warranty deed, dated December 22, 1856, from John Dement and wife, to Isaac Speer, duly acknowledged and recorded, conveying said lands.

Fourth. A judgment in the court below at the July Term, A. D. 1857 (which term ended August 4, A. D. 1857), in favor of plaintiff and others against said Isaac Speer, in the sum of $2,804.30, damages and costs, $26.77; upon which execution was issued August 9, 1857, and returned unsatisfied. And the plaintiff further proved that March 7, 1863, a second *pluries* execution issued, and was levied upon the lands in question, and other lands; that July 8, 1863, the said lands were, at marshal's sale, sold to the plaintiff in error; that February 24, 1865, a marshal's deed, on said sale, was issued to the plaintiff in error, conveying to him the said lands; and that at the time of the commencement of this suit, the defendant was in possession of said lands, and the plaintiff then rested.

DEFENDANT'S CASE.

The defendant reproduced the foregoing title from the United States to Isaac Speer, and offered the following deeds:

First. A quit-claim deed from Isaac Speer to Thomas Speer, dated October 10, 1857, duly acknowledged and recorded, purporting to convey said lands.

Second. A quit-claim deed from Thomas Speer to Samuel Roberts, dated February 7, 1859, duly acknowledged and recorded, purporting to convey said lands.

Third. A quit-claim deed from Samuel Roberts and wife to Charles L. Roberts, dated March 30, 1863, duly acknowledged and recorded, purporting to convey said lands.

Fourth. A warranty deed, in consideration of $600, from Charles L. Roberts and wife to John Pratt, the defendant, dated May 5, 1865, purporting to convey said lands.

He further offered to prove, by his own deposition, actual residence on said lands from September, 1861, under a contract of purchase with Samuel Roberts.

To all which the plaintiff severally objected, the court overruled the objections and admitted the deeds and other testimony, and instructed the jury (see page 8 *infra.*) Verdict was for the defendant. There was a motion for a new trial which was overruled, and judgment was entered on the verdict, to which the plaintiff brings this writ of error; and assigns for errors:

ERRORS.

First. The admission of the defendant's testimony.
Second. The instruction to the jury.
And, *third.* The refusal to grant a new trial.

THE STATUTES.

"Statutes of limitation are peculiarly a matter of local "law," (*Cook v. Norton*, 48 Ill. p. 27.) Those of Illinois are certainly very peculiar.

There are two statutes there, under which a seven years' possession may form the factor of a bar to toll an entry, and constitute the defence to an action of ejectment. The former is known as *the law of 1835*, the latter as *the law of 1839*. *The law of 1835* became §§ 8, 9, 10 and 11 of chapter 66, pp. 349, 350 R. S. 1845, and now appears as §§ 4 and 5, R. S. 1874, p. 674.

The law of 1839 became §§ 8 and 9 of chapter 24, R. S. 1845, p. 104, and now appears as §§ 6 and 7, R. S. 1874, p. 674.

The law of 1835 provides that "Sec. 11. No person "who has or may have any right of entry into any lands, "tenements or hereditaments, of which any person may "be possessed by actual residence thereon, having a con- "nected title in law or equity, deducible of record from "this State or the United States, or from any public "officer or other person authorized by the laws of this "State to sell such lands, for nonpayment of taxes, or "from any sheriff, marshal or other person authorized to "sell such land on execution, or under any order, judg- "ment or decree of any court of record, shall make any "entry therein, except within seven years from the time "of such possession being taken; but when the possessor "shall acquire such title after the time of taking such pos- "session, the limitation shall begin to run from the time "of acquiring title."

Sec. 8 prohibits an action to recover possession in similar terms.

To perfect the bar: 1, The person in possession must actually reside on the lands. 2, He must have an actual title, deducible of record, either in law or equity. 3, This title and actual residence must have concurred and existed together in the same person for seven years.

Collins v. Smith, 18 Ill. 160.
Jayne v. Gregg, 42 Ill. 413.
Bruce v. Schuyler, 4 Gilm. 221.
Elston v. Kennicott, 46 Ill. 208, 209.
McConnell v. Konepel, 46 Ill. 519.
McCagg v. Heacock, 42 Ill. 154.
Paullin v. Hall, 40 Ill. 274.

The law of 1839 provides that every person in the actual possession of lands or tenements under claim and

color of title, made in good faith, and who shall for seven successive years continue in such possession, and shall also, during said time, pay all taxes legally assessed on such lands or tenements, shall be held and be adjudged to be the legal owner of said lands and tenements to the extent and according to the purport of his or her paper title. All persons holding, under such possession, by purchase, devise or descent, before said seven years shall have expired, and who shall continue such possession, and continue to pay the taxes as aforesaid, so as to complete the possession and payment of taxes aforesaid, shall be entitled to the benefit of this section.

R. S. 1845, § 8, p. 104.

Under this section three things must co-exist. 1, There must be actual possession. 2, A continuous or connected claim and color of title. 3, A continued and uninterrupted payment of taxes for seven successive years by these claimants.

Woodward v. Blanchard, 16 Ill. 424.
Darst v. Mitchell, 20 Ill. 227.
Clark v. Lyon, 45 Ill. 388.

The possession must have been adverse.

Cook v. Norton, 48 Ill. 20.

We need not further examine the construction of *the law of 1839*, because the defendant does not claim a bar under this law, nor indeed could he, in view of the payment of taxes.

Transcript, page 18.

The first tax was paid by Samuel Roberts on May 24, 1862.

This statute begins to run from the payment of a tax, after taking possession.

Newland v. Marsh, 19 Ill. 376.
Stearns v. Gittings, 23 Ill. 387.

Concede that it began to run May 24, 1862, from the first payment of a tax by Samuel Roberts, then the seven years had not expired May 15, 1869, when this suit was brought.

But, again, as was said in *Cook v. Norton*, 48 Ill. p. 27, "the statute of limitation did not begin to run until the "expiration of fifteen months from the day of the" marshal's sale — July 8, 1863. "It was because until then "there was no person in being who could bring the suit."

Furthermore, Samuel Roberts parted with his title March 30, 1863, but the taxes for 1862 were not paid by him. They were paid by Charles L. Roberts, April 24, 1863.

Jayne v. Gregg, 42 Ill. 413.

The taxes for 1862 became a lien on the lands from May 1, 1862, and the payment of the taxes by Charles L Roberts was unavailing.

Also, Charles L. Roberts conveyed to John Pratt, June 12, 1865, but John Pratt paid the taxes for 1864 and 1865. Charles L. Roberts should have paid them.

The fact, however, that our suit was commenced within the seven years from May 24, 1862, when the first tax was paid, disposes of all questions under the law of 1839.

Transcript, p. 18.

Stearns v. Gittings, 23 Ill. 387.

Or within seven years from the time when the claim and color of the title became adverse — July 8, 1863.

Cook v. Norton, 48 Ill. p. 27.

The defendant, then, must bring his case under *the law of 1835*.

The court instructed the jury in view of the law of 1835, "That if they should find, from the evidence, that "John Pratt, the defendant, began to reside on said "lands, to-wit.: the E. ½ of N. E. ¼ of Sec. 32, T. 14,

"R. 2 W., in said Mercer County, and had continued to "reside on said land for seven years, prior to the com- "mencement of this suit, claiming title under a contract "with Samuel Roberts, who had a connected title in law "or equity, deducible of record, from the United States, "and that the defendant subsequently acquired a title to "said premises under and in pursuance of said contract, "then their verdict should be for the defendant."

See Transcript, 19, 20.

This instruction is erroneous, both in law and in fact, because:

First. Samuel Roberts and his grantee, Charles L. Roberts, had no connected title, either in law or equity, after the marshal's sale — July 8, 1863. The title which they acquired was overreached and extinguished on that day.

Second. A claim of title would not have been adverse until October 8, 1864 — the expiration of the fifteen months after the marshal's sale.

See *Cook v. Norton*, 48 Ill. p. 27.

A *claim of title* is not sufficient under the law of 1835.

Elston v. Kennicott, 46 Ill. pp. 208, 209.

But the suit was commenced May 15, 1869, less than five years after the statute of 1839 could have begun to run; and, again, the payment of taxes and the claim of title were not in accord.

Third. The defendant in error did not show a contract, for purchase, under which he entered and continued to reside on the lands in controversy.

Fourth. The defendant never acquired a title to the same.

The decision of *Irving v. Brownell*, 11 Ill. 402, was overruled by *Woodward v. Blanchard*, 16 Ill. 425. "The "reasoning and decision of the court in *Woodward v.* "*Blanchard* proceeds upon the ground that the acts were

"designed to protect different grades of title: that the "law of 1839 was intended to reach cases not within the "purview of the act of 1835, and that while mere color "of title would be sufficient under the act of 1839, some- "thing more would be requisite under the act of 1835."

Elston v. Kennicott, 46 Ill. pp. 208, 209.

Fifth. He never acquired a title or an equity, in pursuance of any contract.

Sixth. All claims and rights, if any, which the defendant sets up were subordinate to our judgment lien, and were transferred to the plaintiff in error, both in law and in equity, on the 8th day of July, 1863, by the marshal's sale, which related back to the date of the lien, August 4, 1857, if not to that of the judgment.

We, therefore, contend that:

POINTS.

I

The marshal's sale overreached and extinguished the deeds from Isaac Speer to Thomas Speer, Thomas Speer to Samuel Roberts, and from Samuel Roberts to Charles L. Roberts, and the marshal's deed transferred all the title of Isaac Speer, the judgment debtor, and of his grantees, Thomas Speer, Samuel Roberts and Charles L. Roberts, with all outstanding equities, flowing therefrom to the plaintiff in error.

Fell v. Price, 3 Gilm. 186.
Rogers v. Brent, 5 Gilm. 573. Read pp. 577, 578.
Goff v. O'Conner, 16 Ill. 421.
Stephens v. Ins. Co., 43 Ill. 327.
McCall v. Lenox, 9 Serg. and R. 302.
McCormick v. McMurtrie, 4 Watts, 192.
Coulter v. Phillps, 20 Penn. St. 154.

DeHaven v. Laudell, 31 Penn. St. 120.
Massingill v. Downs, 7 How. 760.
Cook v. Norton, 48 Ill. 20.
Bogue v. Williams, 48 Ill. 375.
Kirk v. Vonberg, 34 Ill. 446, 447.
Durham v. Heaton, 28 Ill. 274, 275.
Bustard v. Morrison, 1 Scam. 235.
Kinney v. Knoeble, 51 Ill. 112.
Reichert v. McClure, 23 Ill. 516.

Defendant in error might have redeemed. He did not.
Rogers v. Brent, 5 Gilm. 573.

His claim therefore became void.— *ibid.*

The deed from Charles L. Roberts and wife, therefore, to the defendant in error, made after this extinguishment, had no connection with the title of Isaac Speer, either legally or equitably; it was merely colorable, so that by his deeds, defendant showed no connected title; hence, the deeds, and evidence of the pretended contracts, and of possession, were all immaterial and unavailing. They, therefore, should severally have been excluded.
Coulter v. Philips, 20 Penn. St. 154.

This disposes also of the charge to the jury.

II.

The defendant in error never had an equitable title to the land in controversy. The pretended contracts with the Roberts, detailed in defendant's deposition, were insufficient for the goundwork of a bill in chancery to enforce a conveyance from Roberts, who held the whole title until it was overreached and extinguished by the marshal's sale of July 8, 1863. The first contract was abandoned; the second was not carried out. The conveyance of May 5, 1865, from Charles L. Roberts and wife to defendant in error, was in no wise connected

with the contract, detailed. The pretended contract amounted to precisely this: defendant in error was to have the two 80 acre tracts, purchased of Roberts, for $4 per acre; he continued in possession with the expectation of being able sometime to pay for these lands, and to have the title. When he went out there from Oswego, Kendall County, he was to break lands for the Roberts, and have an acre for every acre broken; then, afterwards, when he does not say, he was to have the lands at $4 per acre.

All this rested in parole; no evidence was on record to inform plaintiff in error of this claim of title. The defendant in error can fix no time when this claim began. It does not rise to the dignity of a title deducible of record, in equity. Up to March 30, 1863, the title conveyed by Isaac Speer was in Samuel Roberts: taxes were paid most of the time, from May 24, 1862, in subordination to this title.

III.

By the express provision of the statute of 1835 the limitation of seven years could not begin to run until the defendant in error acquired title—a connected title, deducible of record. This he never acquired.

Elston v. Kennicott, 46 Ill. 208, 209.
Woodward v. Blanchard, 16 Ill. 425.
Irving v. Brownell, 11 Ill. 402.

The judgment below should, therefore, be reversed for the errors assigned, and a *venire de novo* awarded.

Respectfully submitted,

EDWARD J. HILL,

Attorney for Plaintiff in Error.

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, A. D. 1877.

DUNDASS T. PRATT,
Plaintiff in Error,

vs.

JOHN PRATT.

No. 208.

In Error to the Circuit Court of the United States for the Northern District of Illinois.

ARGUMENT FOR THE

PLAINTIFF IN ERROR.

By EDWARD J. HILL.

CHICAGO:
PRINTED BY THE CHICAGO LEGAL NEWS COMPANY, 151 & 153 FIFTH AVENUE.
1877.

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vs.

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No. 208.

In Error to the Circuit Court of the United States for the Northern District of Illinois.

ARGUMENT FOR THE PLAINTIFF IN ERROR.

By Edward J. Hill.

May it please the Court:

The plaintiff in error, a citizen of the State of Pennsylvania, on May 15, 1869, in the Court below, brought this suit in ejectment, for the possession of the E. ½ of the N. E. ¼ of Sec. 32, T. 14, N. of Range 2, West of the third P. M., of the value of $2,500, situate in Mercer county, in the Northern District of Illinois, against the defendant, a citizen of the State of Illinois.

The allodial title to these lands, had on the 4th day of

August, 1857, by mesne conveyances passed from the United States, to one Isaac Speer, when a judgment in favor of the plaintiff here, and others against Isaac Speer, was in the Court below made a lien upon them, upon which there was afterwards, on July 8, 1863, a judicial sale, culminating in a marshal's deed, of date Feb. 24, 1865, to the plaintiff. The defendant, if he had any rights, was an intervening incumbrancer, and was concluded by the marshal's sale and deed. At the beginning of the suit, the fee simple of these lands had thus vested in the plaintiff. No Statute of Limitations had run to toll his entry or bar his right of action. The defendant had a naked possession without title, and like those under whom he claimed, had by the judicial sale, which had become absolute, been divested of all right and title in and to these lands, which they had in the meantime acquired from Isaac Speer, the judgment debtor. The defendant, then, was in no position to interpose title or possession as against the purchaser under this judicial sale. That purchaser was the plaintiff.

A glance at the state of the title and the facts disclosed by the record, will show the correctness of our position.

The Title of Isaac Speer.

The following conveyances transferred these lands to Isaac Speer:

1. Patent, United States to Elias B. Stiles, dated Oct. 2, 1854.
2. Warranty deed, Elias B. Stiles and wife to John Dement, dated Oct. 30, 1856.
3. Warranty deed, John Dement and wife to Isaac Speer, dated Dec. 22, 1856, all duly acknowledged and recorded.

The Judgment Lien.

They were incumbered as follows:

At the July term, 1857, in the court below, judg-

ment for $2,804.30 and costs, was rendered in favor of Dundass T. Pratt and others against Isaac Speer, and became a lien on these lands, of date Aug. 4, 1857.

SUBSEQUENT INCUMBRANCES.

After this lien attached, the following conveyances and contracts were made:

1. Quit-claim deed. Isaac Speer and wife to Thomas Speer, dated Oct. 10, 1857.
2. Quit-claim deed. Thomas Speer to Samuel Roberts, dated Feb. 7, 1859.
3. Contract of sale. Samuel Roberts with John Pratt, the defendant, made in Sept., 1861, in writing, (Transcript pp. 7, 8,) and thrown up "in the spring of 1862," (see Transcript fo. 18, p. 8).
4. Contract of sale. Samuel Roberts and Charles L. Roberts with John Pratt, the defendant, made by parol in the spring of 1862.
5. Possession was taken by defendant under the first contract, and actual residence begun on the lands in Sept., 1861. (Transcript fo. 16, p. 7.)

This residence was continued from that time to the commencement of this suit.

THE PLAINTIFF'S TITLE.

All these conveyances and contracts, with all the equities of the defendant, were subsequent in date, and therefore, subordinate to the prior lien of the judgment.

§ 1. R. S. 1845, p. 300.
(Transcript, fo. 13, p. 6.)

No redemption was made by Roberts, the holder of the title, nor by his vendee, the defendant; hence,

On October 8, 1864, at the expiration of 15 months from the sale, the title of Roberts and the equities of the defendant in error absolutely vested in the plaintiff, who was the purchaser thereof at the Marshal's sale, by virtue of that judicial sale.

Neglecting to redeem, and suffering the title to pass to the plaintiff, placed the defendant in error in the position of a grantor through the Marshal to the plaintiff in error. He had his option, to redeem from the sale within 12 months therefrom, or let the title with all his equities, be conveyed. He chose to let the land go; hence,

On the 24th day of February, 1865, the Marshal made his deed of that date, transferring the title of Roberts and the equities of defendant, under his contract with his possession, to the plaintiff.

The purchaser at such a sale acquires only a lien. The title does not vest until the period of redemption is passed. The Marshal's deed relates back, however, to the beginning of the lien, and cuts off all intervening incumbrances.

Huftalin v. *Misner*, 70 Ill., 57.
Hayes v. *Cassel*, 70 Ill., 669.
Stephens v. *Ill. Mut. Fire Ins. Co.*, 43 Ill., 327.
Coulter v. *Phillips*, 20 Penn. St., 154.

In *Bowman* v. *The People*, 82 Ill., 246, Mr. JUSTICE SCOTT, in giving the opinion of the court, says:

"A purchaser at a judicial or execution sale has no such right in the land as would enable him to maintain any action in regard to it, until after the maturity of his title, nor is it an equitable estate in the land."

In *Cook* v. *Norton*, 48 Ill., pp. 23 and 27, Judge LAWRENCE says, until after the expiration of the period of redemption, the possession of a judgment debtor or his grantee, does not become adverse; hence the statute of limitations cannot, until the title arising out of the judicial sale has matured, begin to run. Nothing less than seven full years contitute the period of limitation. The plaintiff's title matured Oct. 8, 1864; the suit was begun May 15, 1869. Has the plaintiff slept on his rights? In *Cook* v. *Norton*, no rights were claimed for more than thirteen years after the maturity of the title under the judicial

sale. Adverse possession, payment of taxes and claim, and color of title in the possessor for seven successive years, was held to be an absolute bar.

In *Martin* v. *Judd*, 81 Ill. 488, a title through a judicial sale and actual residence, by those claiming adversely under such title for over seven years, was held to be a bar within the law of 1835. No such bar exists in our case; we took the title in 1865; we sought the possession in 1869; we are entitled to it.

THE DEFENSE.

This brings us to the defense.

To make the bar, the defendant goes back of our title to September, 1861, when he first went out to Mercer county and began to work and build upon the lands, and proves actual residence from that time down to the commencement of the suit. What of it? Where was our title prior to the expiration of his time for redemption? Where is his title?

For the sake of argument, grant all that the counsel for the defendant can claim under *Cook* v. *Norton*, 48 Ill., 20, and the very recent case, *Martin* v. *Judd*, 81 Ill., 488, namely: that, notwithstanding the execution, sale and Marshal's deed, and the compelete extinguishment thereof of the title in Roberts, and of the equities of the defendant in and to the lands in controversy, derived as intervening incumbrances between the date of the lien and the date of the sale from Isaac Speer, the judgment debtor, and that, by virtue of the subsequent warranty deed made by Charles L. Roberts and wife to the defendant, John Pratt, dated May 5, 1865, the defendant

(Transcript fo. 15, p. 7)

has a title in law, deducible of record, and that his possession by actual residence as vendee of Roberts, was equivalent to actual residence by Roberts himself, (*Martin* v. *Judd*, *supra*,) within the meaning of the law of 1835; *then*, neither the law of 1835 nor the law of 1839 has any

application. Neither law could begin to run until the maturity of the plaintiff's title, which was exactly four years, seven months and seven days only before this suit was begun.

What does it avail him, that he has lived on the land, —that he or his grantors have paid taxes upon it under a common title, when the record shows that they took that title subject to a judgment lien, which they have, allowed to be perfected, and have thus suffered their rights and equities in these lands to be transfered to the purchaser at a judicial sale upon that judgment?

The case is too plain for argument. The instruction was inapplicable to the facts. The seven years actual residence could not possibly have been adverse.

Cook v. *Norton*, 48 Ill., 23, 27.

More than that, Roberts' title was conveyed to the plaintiff in error, and the defendant's equities cut off by the Marshal's deed. The deed to the defendant made after the sale by Charles L. Roberts in 1865, was worthless; to and upon the defendant, a delusion and a fraud.

THE STATUTE OF LIMITATIONS.

When did the statute of limitations begin to run in favor of the plaintiff and against the defendant?

Judge LAWRENCE gives us the answer. He says: "The statute of limitations did not begin to run in his favor until the expiration of fifteen months from the sheriff's sale, because until then, there was no outstanding title upon which suit could be brought. But upon that day the purchaser at the sale was at liberty to take out his deed, clothe himself with the legal title, and demand possession, and from that day the statute began to run."

Cook v. *Norton*, 48 Ill., p. 23.

The defendant's exact position here as a purchaser from a judgment debtor, is clearly stated by Judge LAWRENCE, 48 Ill., p. 27.

The purchaser from the judgment debtor not only *claimed* the fee under his deed, but he really acquired and held it until the sheriff's deed was executed. * * * * * His possession did not commence in subordination to the fee, but as a possession united to the fee, and adverse to all the world. * * * * * * * * Moreover, if the purchaser at the sheriff's sale had a right to suppose that the purchaser from the judgment debtor was buying the fee merely for the purpose of redeeming, he had no right to think so after the time of redemption expired. The latter continued in open and exclusive possession, claiming the land in fee, under a deed that purported to pass the fee, paying the taxes, and never having for a moment acknowledged subordination to any other title. His possession began under his deed, as a possession hostile to all other persons, and though the statute of limitations did not begin to run until the expiration of fifteen months from the day of the sheriff's sale, it was not because there was no adverse possession in fact until that day, but because until then there was no person in being who could bring the suit. That the sheriff's deed must be considered as having been made when the right to it accrued, so far as the statute of limitations is concerned, is conceded by the counsel for the appellant."

Cook v. *Norton*, 48 Ill., p. 27.

Taking this as the correct exposition of the law, then, as our right to a deed accrued Oct. 8, 1864 (the sale having been made July 8, 1863), the statute of limitations did not begin to run until Oct. 8, 1864, and had not barred our right of action when we began this suit, on the 15th day of May, 1869, in the court below. The defendant is, therefore, compelled to insist that the statute began to run from the date of John Pratt's entry as an actual resident on the land in controversy, which was, as he claims, in September, 1861, under a contract of purchase with Rob-

erts. If he had it, and a title deducible of record, and be entitled to set up the continued possession by actual residence during the period from that entry to the beginning of our suit, of course the bar would be complete.

This was the ground upon which the learned judge, who tried the cause below, based the rulings and charge of which we here complain. With due deference to the opinion of the District Judge, we urge, in conclusion, as a complete exposition of the fallacies involved in these rulings and the charge to the jury, the opinion of Judge WOODWARD, in *Coulter* v. *Phillips*, 20 Penn. St., 155, 156. It exactly coincides with the views of Judge LAWRENCE, *supra*.

The opinion was delivered December 20, 1852. The learned Judge says:

"Eli Coulter, the ancestor of the plaintiffs, obtained a judgment against John Philips in 1821, which became a lien on his undivided eighth part of the land in controversy. In 1824, Coulter caused this interest to be levied on and sold at sheriff's sale to himself, and on the third day of September, in that year, he obtained the sheriff's deed. In 1830 he died, leaving the plaintiff's two minor sons his heirs at law.

"Barbara Lear, under whom the defendants claim, purchased the land from Jacob Philips' heirs, of whom John was one, by deed dated 24th August, 1824, made in pursuance of an agreement between the same parties, dated January 2, 1824. This suit was instituted on the 29th July, 1845. There was considerable contest at the trial as to the time, the extent, and the exclusiveness of the possession taken by Barbara Lear, but conceding that it followed immediately on her purchase, that it embraced all the land in her deed, and that it was exclusive, the material question is, does the statute of limitations bar the plaintiff's right to recover an undivided eighth part of the land?

"It is not denied that the statute would run against Eli Coulter from the time he obtained his sheriff's deed, and if it commenced then, his death in 1830, and the minority of his sons would not stop its running, for neither infancy nor coverture suspends the statute after it has once attached. But from the 3d September, 1824, to the 29th July, 1845, was not twenty-one years, and it is nothing less than the full statutory period that bars the right of [156] recovery. The defendants, therefore, are obliged to contend that the statute began to run against John Phillips from the date of his sale to Barbara Lear, and that Coulter, his judgment creditor, succeeded to such estate only as he had at the time of the sheriff's sale. If this theory be correct the defense is perfect, for from the time when Barbara purchased and took possession to the commencement of this action, more than twenty-one years elapsed.

"A judgment creditor acquires a lien on all the interest the defendant has in real estate in the county, and the debtor cannot affect it by any conveyance he may make of his estate. Levy and sale are remedies which belong to the lien, and when applied they transfer to the purchaser, not the debtor's interest, as he may have reduced it by conveyance or incumbrance, but his interest as it was when the lien of the judgment attached. A title paramount to the defendant's, or twenty-one years adverse possession by an intruder or a stranger to the defendant, may avail to defeat the rights and remedies of a lien creditor. A possession that would bar the debtor would divest the rights of his creditor. But a party coming into possession *under* and *according* to the title of the defendant, takes it *cum onere*, and the creditor's relation to the land remains unchanged. When, in the exercise of rights incident to his lien he sells it at sheriff's sale, the purchaser takes the title the defendant held when the lien attached, unaffected by subsequent mort-

gages, judgments or conveyances. It would be absurd for the *defendant* to set up the statute of limitations against such purchaser. It would be no less absurd to permit his alienee to do it.

"The truth is, the statute has no application in such a case. Lien creditors are subject to a limitation of five * years; but the statute of limitations, that concerns the action of ejectment has no relation to them. They have no estate in the land, no right of entry, no action to be affected by the statute. The statute bars the right of action and protects the occupant, not for his merit, for he has none, but for the demerit of his antagonist in delaying his action beyond the period assigned for it: *Sailor* v. *Hertzogg*, 2, Barr, 185. But what right of action has a lien creditor to delay? His only remedy is by levy and sale. If he become the purchaser his relations to the land are changed. He then has an estate and a right of entry. Then the statute may attach. Before it can not. The theory of the defense, therefore, which was nothing more or less than the setting up of the statute of limitations against a judgment creditor, is without any foundation in law, and the Court were wrong in sustaining it."

We therefore respectfully ask that the judgment be reversed and for a *venire de novo*.

EDWARD J. HILL,
Attorney for Plaintiff in Error

* Seven years in Illinois.

SUPREME COURT OF THE UNITED STATES.

October Term, 1875. No. 208.

DUNDASS T. PRATT

VS.

JOHN PRATT.

Error to the Circuit Court of the United States for the Northern District of Illinois.

ADDITIONAL AUTHORITIES on part of PLAINTIFF IN ERROR.

JEROME CARTY,

Of counsel with Edward J. Hill,

For Plaintiff in Error.

Gillin & Nagle, Print.

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As to the construction placed upon the act of 1835, under which alone it is conceded can the charge of the Court below be applied, see Moore vs. Brown, 11 Howard, 427, opinion of Chief Justice Taney.

On general principles, no statute of limitation, general or special, could begin to run against plaintiff in error until the cause of action or the right of entry accrued. See Shelburne Ex. vs. Robinson, 3 Gilman (Illinois), 599; Henderson vs. Griffin, 5 Peters (U. S. C. C.), 158; Bradstreet vs. Huntingdon, ibid., 402; Thomas vs. Connell, 5 Barr (Penna.), 13; Barry vs. Debin, ibid., 431.

Angell on Limitations, chapter xxx, section 369, uses the following comprehensive language on this subject: "Although the action of ejectment is not eo nomine included in the act of limitations, yet inasmuch if it be enacted that none shall make an entry but within a certain declared period of time after the right or title shall first descend or accrue, and inasmuch as that right is taken away by the lapse of the prescribed period, the consequence is, that no action of ejectment (the privilege of bringing which is entirely dependent on the right of entry) can be sustained."

"Indeed, the right of entry and the right to maintain ejectment are so much alike in legal sense, that one may be used in that sense for the other. This has long been held under the statute of James, and regarded as the settled construction in this country."

"Therefore to determine whether or not the party is barred of his right to maintain an action of ejectment, it is requisite to determine when his right of entry accrued."

Much confusion prevails in the Illinois cases by reason of the loose manner in which the acts of 1835 and 1839 have been applied, and that is the sole difficulty in this case, on the part of the Judge in the instruction to the jury in the Court below. Chief Justice Breese in Elston vs. Kennicott, 46 Illinois, page 207, in a few words defines their application in substance, thus:

The acts of 1835 and 1839 were designed to protect different grades of title.

A prima facie title, from the United States, or under a judicial sale, is required, under the act of 1835, with possession, actual or constructive, for seven years; while a mere *color or claim* of title, supported by possession, actual or constructive, and the payment of taxes for seven years, is sufficient, under the act of 1839.

In both of the latest and ruling cases in Illinois, Cook vs. Norton, as to act of 1839, and Martin vs. Judd, as to act of 1835, the actions were commenced long after the expiration of seven years from the time of the *right of entry or action accrued*, and are perfectly in accord with the principles contended for in this case.

The converse of the reasoning of those cases is perfectly applicable to the case in question, because the action of ejectment in this case was commenced long before the expiration of seven years after the right of entry or action accrued, and those cases virtually decided the question for the plaintiff in error, and this writ of error should never have been made a necessity of the case. It is, in effect, difficult to refrain from expressions of great surprise, in regard to the refusal of the Court below to grant a new trial.

JEROME CARTY,
Of counsel with Edward J. Hill,
for Plaintiff in Error.

Phila., Feb. 4th, 1878.